was held to be part of the realty, following *Stockwell v. Campwell, supra.*

From a consideration of the foregoing authorities, the better opinion seems to be that a portable hot air furnace connected with the house in the ordinary way, is a real fixture, and therefore part of the realty when annexed. The nature of the annexation is such that the premises become adapted to its use, and it becomes an essential part of the realty.

LIABILITY OF MUNICIPALITIES FOR TORTS OF OFFICERS OF THE STREET CLEANING DEPARTMENT.

The liability of a municipal corporation for the torts of its agents committed while in the prosecution of their duties, is a subject which has presented many questions of technical nicety, and has resulted in a diversity of opinion. It is generally conceded that the duties imposed upon a municipal corporation are of a dual nature, one arising from a grant of a special power in the exercise of which it acts as a legal individual, and the other is implied from the exercise of political rights, under the general law, as to which it acts as a sovereign. As to torts of agents arising out of duties of the latter character, there is no question as to the liability. The corporation acting as a sovereign is not liable. And the corporation acting in the performance of duties of the latter character through its agents, is liable for their torts. But what has lead to confusion and diversity of opinion is the question as to what constitutes a duty of the former class. *Dillon on Municipal Corporations,* Vol. 1, section 66 (4th edition), says: "In its proprietary or private character the theory is, that the powers are supposed not to be conferred primarily or chiefly, for considerations connected with the government of the state at large, but for the private advantage of the compact community, which is incorporated as a distinct legal personality or corporate individual; and as to such powers or property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it, is omnipotent."

In the case of *Hewitt v. City of Seattle,* 113 Pac., 1084, recently decided by the Supreme Court of Washington, it was held that

the liability of a city for injuries caused by defective streets, is not limited to injuries caused by structural defects or obstructions, and that a city was liable for injuries to one who was negligently run over by an automobile driven by the superintendent of streets while in the exercise of his official duties. In this complaint, the plaintiff alleges negligence on the part of the city through its agent Maloney, and that the automobile was being driven at an unlawful rate of speed, and sues for damages. A verdict was returned for $1,500, judgment was entered thereon, and the city appealed. The decision was affirmed on appeal.

Qui facit per alium facit per se, is a maxim applied to the relation of principal and agent. And from this has developed the doctrine of *Respondeat Superior. Judge v. The City of Meriden,* 38 Conn., 90, held, that surveyors of highways appointed by towns, and street commissioners appointed by cities, are, when repairing defective highways, in the performance of a public duty, and the rule *Respondeat Superior* does not apply to those corporations in respect to such acts of such officers. But on the other hand, *Hall v. City of Austin,* 73 Minn., 134, held that the duty of caring for and supervising the condition of its public streets is one which rests upon a municipal corporation as such and the doctrine of *Respondeat Superior* applies.

In *Severn v. The City and County of San Francisco,* 115 Cal., 648, the court held, that municipal corporations are not liable for dereliction or remissness of municipal officers, or agents, in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers which are prescribed and limited by express law. And when an injury results from the wrongful act or omission of a municipal officer charged with a duty prescribed and limited by law, the doctrine of *Respondeat Superior* is inapplicable, and the officer is not treated as the agent or servant of the corporation in the performance of such duty, but is held to be the servant and agent of, and controlled by the law, and for his acts the municipality will not be held liable. *Baker v. West Chicago Park Commission,* 66 Ill. App., 507, in substance held the same as the case above. The plaintiff was injured from the negligence of the officers of the defendant in giving the plaintiff, an employee, a vicious and unsafe horse to use. The court said: "If agents or servants of a municipal corporation are independent of the corporation as to the term of their

office and the manner of discharging their duties, the corporation is not impliedly liable for their acts of negligence, and the doctrine of *respondent superior* does not apply."

A city is not liable for the negligence of a laborer employed by its superintendent of streets, in the construction of a new street which has been laid out by the Board of Aldermen, and which they have directed the superintendent to build, if, under the charter of the city, the superintendent was acting as a public officer in employing the laborer and in constructing the street. *Jensen v. City of Waltham,* 166 Mass., 344.

The street commissioner in rebuilding a retaining wall set up a derrick so negligently that by reason of such negligence a laborer on the work was injured and the municipality was held not responsible. *Bowden v. The City of Rockland,* 96 Me., 129.

The cases above discussed, for the most part, hold, that the acts of a street commissioner or superintendent of streets in repairing and supervising the repair of the streets of the city, fall under the powers of the municipality, which are considered of a political and public nature. *City of Winona v. Botzet,* 169 Fed., 321, discusses the dual duties of a municipal corporation in the following language: "Municipalities have two classes of powers, the one political, public, in the exercise of which they govern their people and act as delegates of the state; the other private, business, in the exercise of which they act for the advantage of their inhabitants and themselves. They are not liable in damages for the acts and omissions of their officers and agents in the exercise of the former. But they are liable in damages for the negligent and wrongful acts and omissions of their agents and officers within the scope of their authority, in the exercise of the latter." The courts are in direct conflict as to what acts of servants and agents of a municipality fall within this latter class of duties. In *Normile v. The City of Ballard,* 33 Wash., 369, a city engineer was negligent in wrongfully estimating the quantity of gravel removed by a third person, resulting in the plaintiff making an overpayment for such quantity as estimated. The court held that the city is liable for the wrongful and negligent acts of its engineer, done in the course of his official duties, with reference to the improvement of the streets of the city.

Collensworth v. The City of New Whatcom, 16 Wash., 224, goes even further than any of the cases cited, in holding that where a municipal corporation undertakes the construction of a public work which falls legitimately within its corporate powers, it is liable for any injury resulting from the negligence of an employee, although in attempting to exercise such powers, the corporate authorities act in excess of the powers conferred by the charter, and enter into a contract that is clearly *ultra vires.* And in the case of the *City of Denver v. Peterson,* 5 Colo. App., 41, it was held that the board of public works was one of the agencies of the city for the transaction of its corporate business, and if through negligence or malfeasance of this board or of its servants and employees, a cause of action accrues to an individual the city must respond. The defendant in *Hinds v. The City of Marshall,* 22 Mo. App., 208, was also held liable for damages caused by defects in the street, although the failure to repair the same was due to the negligence of the street commissioner. *Funnell v. City of St. Paul,* 20 Minn., 117, and *Niven v. City of Rochester,* 76 N. Y., 619, held the defendants liable under similar circumstances.

In *Fox v. The City of Philadelphia,* 208 Pa., 127, the city was held liable for the death of a passenger, caused by the negligence of an operator of an elevator, employed by the public building commission, where the elevator in question was being used in carrying the public to the courts, and the operator was being paid by the city. And *Missano v. Major, etc., of New York,* 160 N. Y., 123, practically the same question is presented and decided in the same way. This case, in principle, is exactly the same as the principal case. This was an action to recover for the death of a child who was run over and killed by a horse attached to an ash cart of the city cleaning department. The court held that the city was liable for the negligent acts of its employees in its department of street cleaning. And *The New York and Brooklyn Saw Mill and Lumber Co., App., v. City of Brooklyn,* 71 N. Y., 580, held the same as the case above.

The duty imposed upon the city in keeping the highway clear from encumbrances, is in its nature private, and the persons employed to perform it are the agents of the corporation in its private capacity; and for their acts while so engaged, the corporation is liable *civiliter,* precisely to the same extent that any other master

is liable for the acts of his servants while employed in his business. *Scott v. The City of New York,* 50 N. Y. Supp., 191. The commissioner of street cleaning of the City of New York is an agent of the city, and not an officer of the general public, notwithstanding his duties are partly rendered in the interests of the public health, and his powers are plenary, and within their sphere, exclusive of the authority of an officer of the city. The city is, therefore, liable for his negligent acts done in the course of his official duty. *Barney Dumping-Boat Co. et al. v. Major, etc., and The City of New York,* 40 Fed., 50.

It seems from the authorities examined, that they divide themselves territorially. The New England states hold that the duties of supervising the streets of a municipality are of the class denominated public, and therefore the municipality is not liable for damages resulting in the negligent or wrongful performance of such duties by its officers or agents. As such, they are agents of the public at large, exercising their duties under governmental powers, on behalf of the state in general. But in other jurisdictions, the great weight of authority seems to be that such duties are part of the duties of municipalities, exercised for the benefit of the compact community and of the municipalities themselves. Therefore cities are liable for any damages resulting from the negligent performance of duties of this nature, by their agents and officers. Thus the weight of authority seems to be with the principal case, although there are some conspicuous authorities which have taken a decided stand against it, and the bulwark of which is unshakable.

THE STATUS OF A STREET RAILWAY IN THE CITY STREETS.

In the *New York Cent. & H. R. R. Co. v. City of New York et al.,* 127 N. Y. Supp., 513, the Hudson River R. R. Co. which had been organized since 1846 for a term of fifty years obtained from the State of New York the right to lay tracks in certain streets in New York City. This company was afterwards consolidated and became a part of the New York Central lines, under a law that provided that the franchises of each corporation should be vested in the new company. The city ordered the tracks of the plaintiff to be removed at the expiration of the fifty-year term because they had become a nuisance. The court enjoined the